

PUBLIC DEFENDER NEWS

CHIEF'S CORNER

Let's take a moment to note the passing of Dollree "Dolly" Mapp, whom a prominent legal scholar has called the "Rosa Parks of the Fourth Amendment." In 1957, this African American woman stood up to a group of white police officers who demanded entry into her home. Her actions sparked a dramatic shift in the constitutional protections afforded to citizens, set out in *Mapp v. Ohio*, 367 U.S. 643 (1961).

As detailed in an [article](http://www.themarshallproject.org) recently posted by The Marshall Project (www.themarshallproject.org, 12/8/14), Mapp rented half of a two-family house in Cleveland. Police investigating the bombing at the house of a racketeer received a tip that a suspect might be hiding in Mapp's home. Three officers arrived and demanded entry. Mapp refused. She called a lawyer, who advised her to let the officers in only if they produced a search warrant, and even then, to make sure she first read the warrant. About three hours later, the police, now between 10 and 15 in number, forced their way into the home. Mapp demanded to see a search warrant. An officer held up a piece of paper and said it was a warrant, but would not let Mapp read it. The Supreme Court described what happened next: "[Mapp] grabbed the 'warrant' and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been 'belligerent' in resisting their official rescue of the 'warrant' from her person. Running roughshod over appellant, a policeman 'grabbed' her, 'twisted [her] hand,' and she 'yelled [and] pleaded with him' because 'it was hurting.'" Police then searched through the entire house, and found a pencil sketch of a nude and four books considered obscene, with titles that included "Memoirs of a Hotel Man" and "Affairs of a Troubadour." Mapp told police the materials belonged to a former roomer, for whom she had stored them. She was charged with possession of obscene material. At trial, no warrant was ever produced, nor did the



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SPECIAL POINTS OF INTEREST

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state offer any explanation for its failure to produce a warrant. Mapp was convicted and sentenced to prison.

When the police broke into Mapp's home, the exclusionary rule, which excludes from trial illegally obtained evidence, did not apply in state courts. The Supreme Court recognized that the integrity of judicial proceedings was undermined, and used Mapp's case to change the law. The Court reversed Mapp's conviction, and in doing so ruled that under the Due Process Clause of the 14th Amendment, all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. The Court summed up the need for the exclusionary rule as follows:

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "the criminal is to go free because the constable has blundered." . . . In some cases this will undoubtedly be the result . . . But, . . . "there is another consideration -- the imperative of judicial integrity." . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Dolly Mapp was a strong-willed woman. She lived a long and colorful life, and died earlier this year, at 91.

Bill

A DAY IN THE LIFE

Helena public defender Brady Smith was recently the subject of an article in the *Independent Record* entitled "Highs and Lows: A day in the life of a public defender."

Brady speaks for many public defenders when she says, "The highs are really high and the lows are really low, but there's never a dull moment. I may have crazy things happening in my day and it may be super stressful. I wouldn't have that in any other jobs. I'm never bored."

Brady says she's in it for the long haul. You can read the whole story [here](#).



The Mapp ruling changed policing in America by requiring state courts to throw out evidence if it had been seized illegally.

DON'T FORGET YOUR WITNESSES!

Carleen Green

Witnesses are entitled, by state law, to a fee of \$10 per day plus mileage and other travel expenses. [OPD Policy #140](#) applies whether a witness testifies voluntarily or by OPD subpoena.

We are responsible for providing witnesses with the forms to request reimbursement, and failing to do so has been an audit issue in the past. The accounting department has not been seeing very many of these reimbursement requests which could be for one of two reasons: 1) the witnesses are not being given the forms; or 2) the witnesses are not turning in the forms to Central Services.

Please make sure witnesses are either given the forms when they appear to testify or are directed to them on the OPD website (Resources tab, Policies, Policy 140). It is then the witness's responsibility to submit the forms to Central Services if they wish to be reimbursed.

APPELLATE NEWS

Actual Physical Control Test for Montana DUI has Changed: Turns Out It Does Matter that the Vehicle is Incapable of Moving.



Wade Zolynski,
Chief Appellate Defender

Assistant Appellate Defender Chad Vanisko (appellate counsel) and OPD contract attorney Paul Neal (trial counsel) recently scored a victory in the “actual physical control” arena in *State v. Sommers*, 2014 MT 315. The Court reversed Mr. Sommers’ DUI conviction and changed the

law on jury instructions involving “actual physical control” in some Montana DUI cases.

At trial Mr. Sommers’ testified that he drove to Town Pump to purchase beer. *Sommers*, ¶ 7. As he was pulling into the Town Pump parking lot, he heard a loud clunk. *Id.* Sommers assumed the clunk came from his truck’s universal joint because it had previously been making clunking sounds. *Id.* He was able to coast his truck into a parking space, but the truck would not move on its own power from the parking space. *Id.* He did not think he could move the truck by pushing it because it weighed too much. *Id.* Sommers went to the bar next door. *Id.* While at the bar he drank “a lot” and called his girlfriend to ask for a ride to Missoula. Sommers’ girlfriend and her brother testified at trial. *Sommers*, ¶ 10. The two arrived after Sommers had been arrested and saw a piece of the truck hanging down from the undercarriage, touching the ground. *Id.* Both saw marks where the piece had dragged along the ground. *Id.* After the State’s case Sommers moved for a judgment of acquittal arguing there was no evidence of actual physical control because the vehicle was both inoperable and immovable. *Sommers*, ¶ 11. The district court denied the motion and instructed the jury that for actual physical control to be found “[i]t does not matter that the vehicle was incapable of moving.” *Sommers*, ¶ 12. Sommers was convicted.

The Supreme Court reversed. The Court discussed its prior cases on this subject. *Ruona*, 133 Mont. 243, 321 P.2d 615 (1958), indicated that actual physical control necessarily means control of a vehicle’s movements. Yet, both *State v. Taylor*, 203 Mont. 284, 661 P.2d 33

(1983) (otherwise operable vehicle stuck in a borrow pit) and *State v. Gebhardt*, 238 Mont. 90, 775 P.2d 1261 (1989) (otherwise operable vehicle stuck in the mud), indicated movement was irrelevant to the question of actual physical control. The district court’s jury instruction apparently relied on the language from these two cases. The Supreme Court stated: “We disapprove of the stand-alone statement from *Taylor*, ‘It does not matter that the vehicle was incapable of movement,’ and the statement from *Gebhardt*, ‘A motorist does not relinquish control over a vehicle simply because it is incapable of moving,’ as jury instructions.” *Sommers*, ¶ 28.

So how should you define actual physical control when movement of the vehicle is at issue in a DUI? The Court agreed with a majority of other states that a fact-intensive totality of the circumstances approach should be taken. *Sommers*, ¶ 32. Among the factors appropriate for the jury to consider are:

1. Where in the vehicle the defendant was located;
2. Whether the ignition key was in the vehicle, and where the key was located;
3. Whether the engine was running;
4. Where the vehicle was parked and how it got there;
5. Whether the vehicle was disabled (broken down, mechanically inoperable, stuck, or otherwise immovable); and
6. How easily the defendant could have cured the vehicle’s disability.

Sommers, ¶ 35. The list, said the Court, is not meant to be all-inclusive; the parties may present evidence of, and the jury may consider, relevant factors not on the list. *Sommers*, ¶ 35. The Court indicated these factors should accompany an appropriate definition of “actual physical control,” such as: An individual is “in actual physical control” of a vehicle when the individual is not a passenger, and is in a position to cause the vehicle to move, or to control the vehicle’s movement in some manner or direction. *Sommers*, ¶ 35.

Thus, “a person in a vehicle up on blocks, with no wheels, [cannot] be found guilty of DUI” in Montana. *Sommers*, ¶ 22.

May the force be with you.

AND THE AWARD GOES TO . . .



Congratulations to Laura Schultz, Office of the Appellate Defender, for being named the October Support Staff Employee of the Month. Laura was nominated and is being recognized because she “brings her determined work

ethic, calm demeanor regardless of the pressure of deadlines, artistic touches, and sense of humor to our office each day. When faced with a challenge, she smiles, and then gets it done. We are fortunate to have her on the Appellate Team.”

The November award went to Jamie Moore (Havre). Jamie was honored for “. . . doing it all with a smile on her face. She answers the ever-ringing double phone lines, hunts down financial information for IQs, makes sure the three attorneys’ calendars are accurate, communicates with the 16 different courts in our region and coordinates schedules to ensure our clients have an attorney there. Most of all, Jamie’s sunny personality is a blessing both for the staff in our office and our clients. She is always ready to listen to a client’s troubles with a kind ear and heart.”

From an extremely large pool of nominations, the December award went to Jason Kindsvatter, Great Falls. Jason “has a cheery attitude in difficult situations. [He] is like the office bouncer . . . the person we count on to handle difficult situations [with clients].” “Jason has always been prompt, professional and very diligent in his work with our office.”

Dozens of support staff have been nominated by their supervisors and their peers over the last six months. Thank you all for your contributions to OPD and to our clients.

Please continue to recognize your support staff and [submit](#) your January nominations by January 20.

KUDOS!

Bill Hooks



Congratulations go out to Madison Mattioli, our Missoula intern and a third-year UM law student, who recently accepted a clerkship position

with U.S. District Judge Brian Morris.

Madison will take up her new duties after she takes the bar exam next summer. Among her many contributions, Madison has revamped and administered OPD’s brief bank, assisted the Region 2 attorneys, and argued cases before the Sentence Review Division.

We have several commendable victories to note. Randi Hood and Tom Schoenleben successfully defended a client on a deliberate homicide charge following a six-day trial in Havre. Their client was convicted on a lesser included offense of negligent homicide.

Following a week-long trial in Region 4, the team of Chris Abbott, Stephanie Robles, Christine Munsey, and Jennifer Hudson won an acquittal in a difficult child sex case. Their client was charged with sexual assault of a young girl, alleged to have been committed over a multi-year span. The case involved investigation in two states, a hefty pretrial motions practice, and a battle of experts.

Ron Piper in Hamilton obtained dismissal of a felony charge in a case that garnered widespread attention. The state charged Ron’s client with criminal endangerment, on the basis of allegations that the client tested positive for dangerous drugs for which she had no prescription while she was pregnant. Ron filed a motion in which he challenged the state’s probable cause representations and moved to dismiss the Information. The District Court granted the motion and denied the state leave to file the Information.

IS MINDFULNESS-BASED STRESS REDUCTION FOR YOU?

Jessica Polan

Recently I attended the National Conference for Lawyers Assistance Programs. The conference offered morning meditation classes and the Chopra Center did an insightful talk on meditation and lawyers. Although meditation was already an important part of my routine most days (unless I am really busy...), the CoLAP Conference reminded me of the importance of my meditation practice. Meditation gives me a healthy way to relax and not think about all the things I have to do that day.


In a recent article in the Harvard Medical School's *Health Publication* "[Mindfulness Meditation May Ease Anxiety, Mental Stress.](#)" Dr. Elizabeth Hoge, a psychiatrist at the Center for Anxiety and Traumatic Stress Disorders at Massachusetts General Hospital and an assistant professor of psychiatry at Harvard Medical School, says that mindfulness meditation makes perfect sense for treating anxiety. "People with anxiety have a problem dealing with distracting thoughts that have too much power," she explains. "They can't distinguish between a problem-solving thought and a nagging worry that has no benefit."

"If you have unproductive worries," says Dr. Hoge, you can train yourself to experience those thoughts completely differently. "You might think 'I'm late, I might lose my job if I don't get there on time, and it will be a disaster!' Mindfulness teaches you to recognize, 'Oh, there's that thought again. I've been here before. But it's just that—a thought, and not a part of my core self,'" says Dr. Hoge.

One of Dr. Hoge's recent studies found that a mindfulness-based stress reduction program helped quell anxiety symptoms in people with generalized anxiety disorder, a condition marked by hard-to-control worries, poor sleep, and irritability. People in

the control group—who also improved, but not as much as those in the meditation group—were taught general stress management techniques. All the participants received similar amounts of time, attention, and group interaction.

In my experience working in the OPD, stress and anxiety go hand in hand with my every day job description. Attorneys have the highest rate of suicide and depression and meditation is one healthy outlet. There are many different types of meditation and I would encourage people to find what works for them.



“Breathing in, I calm my body.
Breathing out, I smile. Dwelling in
the present moment, I know this is
a wonderful moment.”
—Thich Nhat Hahn, *Breathing Peace*

Recently I, and other attorneys in Region 1, did an excellent 21-day challenge facilitated by Deepak Chopra and Oprah. The website for more information on that is: <http://www.chopra.com/>. There are a lot of other options and I would encourage you to find the type of meditation that is most comfortable for you.

Happy Holidays!

WELLNESS RESOURCES FOR THE NEW YEAR

If quitting tobacco is one of your goals for 2015, there are a variety of programs available to you.

- ◆ The [Tobacco Quit Line](#) provides free nicotine replacement therapy and discounted prescription meds for all Montanans.
- ◆ Information on the Cigna and Montana Health Center tobacco cessation programs for State employees is [here](#).

There are several [Wellness](#) programs available to us, including a [Prenatal](#) program with cash incentives!

Discounts on gym memberships, Weight Watchers enrollment fees, and more are [here](#). Good luck with your goals for 2015!

THE GIVING SEASON

Gift Tree Adoption

Britton Frisbie

The Billings Office adopted a deserving child from a gift tree this year and with the inner office donations, here is some of what we were able to do for him. He only asked for new shoes, a coat and a few items of clothing. Although he didn't ask for any toys, we included a few in addition to the items on his wish list.

We hope we give him a Christmas to remember !



Region 6 Gives Back!

Cathy Huston and other members of the Xi Tau Chapter of Beta Sigma Phi hold a craft auction each November to raise money to buy gifts for needy families over the holidays. This year, in addition to kids and families, they purchased 38 individual gifts and made two large raffle baskets for the Hill County Drug Court participants hoping to make their Christmas a little bit brighter!!!



*The OPD elves
have been busy
this year!*

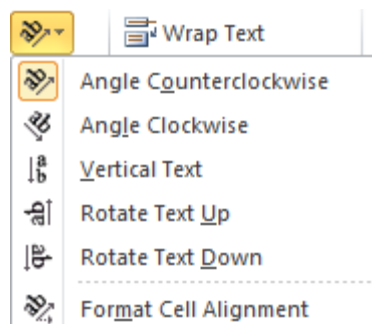
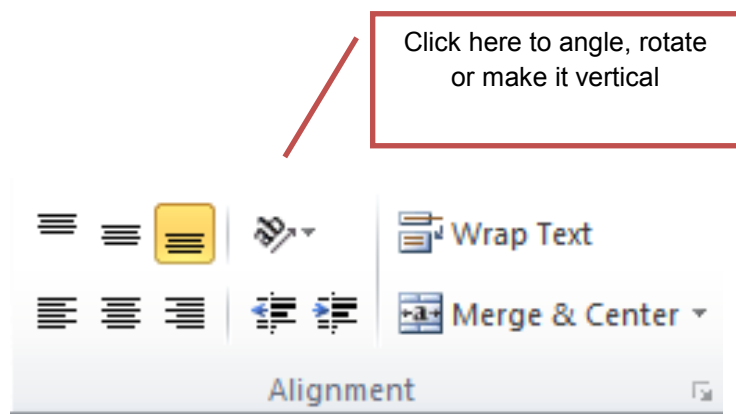
TIPS AND TRICKS

EXCEL TIPS

Brenda Ingersoll, Accountant

Column Heading Formatting

You can change the look and fit of your column headings quickly and easily on the **Home** tab under the **Alignment** section:



HAVE TROUBLE
REMEMBERING
WHEN TO USE
"I.E." OR "E.G."?

Misusing these two abbreviations is a common mistake. *I.e.* and *e.g.* are both abbreviations for Latin terms. *I.e.* stands for *id est* and means roughly “that is.” *E.g.* stands for *exempli gratia*, which means “for example.”

Here’s a memory trick to help you remember the difference. From now on, *i.e.*, which starts with *i*, means “in other words,” and *e.g.*, which starts with *e*, means “for example.” Some people remember the difference by imagining that *i.e.* means “in essence,” and *e.g.* sounds like “egg sample,” and those are good memory tricks too.

I = in other words.

E = example.

Don't italicize *i.e.* and *e.g.*; even though they are abbreviations for Latin words, they've been used for so long that they're considered a standard part of the English language. Also, remember that they are abbreviations, so there is always a period after each letter.

Grammar Girl has more on *i.e.* vs. *e.g.* (and other grammar conundrums) at <http://www.quickanddirtytips.com/education/grammar/ie-versus-eg>

LEGISLATIVE PREVIEW

The 2015 Legislature will convene in Helena on January 5, 2015. When the legislators arrive, they will find that much of the work has already been done. Hundreds of proposed bills are submitted by agencies and legislators in the interim prior to the start of the session. OPD has eight bills submitted as of the date of this summary. Some of our proposed bills are intended to refine the rules by which we conduct our eligibility determinations. We again will propose that misdemeanor statutes be amended by removing the possibility of jail time as a condition of sentence, and thereby remove the obligation that courts assign counsel.

We will monitor the status of proposed legislation that may impact the agency and our clients. OPD is an executive branch agency, and we do not lobby for or against bills submitted by other agencies. We may appear in the role of an "informational witness" on bills that may have an impact on public defense and we will offer a position regarding that impact. A frequent way in which we provide information on a bill's impact is by submitting a fiscal note. If we believe a bill might have a financial impact on our operations, for example by creating more work for us, we attempt to quantify the financial impact we believe we would sustain by passage of the bill. We use data developed from JustWare and other internal reports, and internal surveys, to determine the fiscal impact. This information is included with the legislation so legislators can consider the possible fiscal impact passage of a bill would create.

The Governor's proposed budget for the next two fiscal years recommends that OPD receive about a 29% increase over the legislative appropriation we received in 2013. Fighting for

a pay increase for our non-attorney work force remains a key priority as we begin the session.

Our budget is part of the House Bill 2 process.

It will initially be heard by a six-member Joint Appropriations Subcommittee comprised of three representatives and three senators from various parts of the state—the Judicial Branch, Law Enforcement, and Justice ("Section D") subcommittee. Our budget hearings have not yet been set, but we expect that they will be scheduled for some time in mid-January.

If you are interested in seeing who is on the committee, the dates of the hearings, or if you want to follow the process you can check it out on the 64th Session [homepage](#).



"Both prosecution and defense must submit any unwritten laws in writing."